In the first suit in this country (the probate proceeding brought by the widow in New York on April 1, 1955), petitioner appeared and filed objections attacking the validity of the will and claiming that decedent was domiciled in Switzerland and specifically asserting that he was entitled by the application of the Swiss-American Treaty of 1850 to a forced share in the estate (A222, 223, 225-228).* As will be seen, except that he now concedes the validity of the will and the New York domicile, and has changed his interpretation of the treaty, petitioner's claim in the second New York suit (the present suit—in which he now seeks certiorari) is precisely the same: that is, that, under the treaty (as he now interprets it), he is entitled to share in this estate.** What petitioner would overlook is that he litigated that question to a concededly final determination in the first New York proceeding and cannot litigate it again just because he wishes to argue another (and, as we submit is clear, an erroneous) interpretation of the same treaty.

In the first New York suit, the widow, on March 16, 1956, moved to dismiss petitioner's objections on the ground that decedent was domiciled in New York and that under the laws of New York an illegitimate child did not have an inde-

* The petition for certiorari is plainly in error in stating (p. 8) that the New York court in the first proceeding had "no hint" that the will had been filed in Geneva. To the contrary, the court was very specifically aware of that fact from the petition which expressly stated "the original will is now on file in the office of the Court of Justice of Peace of the Republic and Canton of Geneva, Switzerland" (A35). Indeed, the court's own decree explicitly noted this (A243).

** The petition for certiorari is again plainly in error in stating (p. 8) that petitioner "opposed the grant of the letters on the single issue of domicile and no other issue". As the Court of Appeals noted (17 N. Y. 2d, at p. 271) and as the record explicitly confirms (A225, 226, 228) petitioner also attacked "the validity" of the will.

feasible right to share in the estate of his father contrary to the terms of a valid will and, accordingly, petitioner had no rights in the estate (A228-232). The New York Surrogate heard the evidence of both parties and, determining that decedent died domiciled in New York, dismissed petitioner's objections by order dated March 19, 1957 and, by decree dated May 16, 1957, admitted the will to probate (A232-239, 242-244). Letters of Administration with the will annexed thereafter issued to The Hanover Bank which proceeded to administer the estate according to law.

Petitioner appealed to the Appellate Division, First Department from, among other things, the order of March 19, 1957 determining that he had no interest in the estate. He did not prosecute the appeal, however, and the Appellate Division on June 28, 1957 dismissed the appeal (A240-242). There is no dispute that that order is final and personally binding on petitioner.

On October 6, 1958, the administrator c.t.a. filed its account together with its petition for judicial settlement of the estate (A248-249). Since the Court had previously finally adjudicated that petitioner herein had no interest in this estate, he, of course, was not cited. Thereafter, by decree dated December 2, 1958, the Surrogate settled and allowed the account and, in accordance with the decedent's will, the estate was distributed to the widow (A248-252).

Five years after the will was probated and some two and a half years after final distribution of the estate assets, on May 11, 1961, petitioner herein brought the present proceeding—the second suit in New York in which he appeared as

a party to litigate the question of whether he should share in this estate.

In this second New York suit petitioner asserted that there was fraud in the earlier suit (which allegation he abandoned at the trial below) and that, contrary to the interpretation he urged at the earlier trial, the treaty's application turned on physical location of property rather than domicile of the decedent. That decedent died domiciled in New York is, however, no longer disputed; it is, indeed, expressly conceded in petitioner's supplemental memorandum in the Surrogate's Court below (p. 6), in petitioner's brief in the Appellate Division below (pp. 2, 37) and in petitioner's brief in the Court of Appeals below (pp. 2, 38, 41).

All that remained then in this second suit was petitioner's second interpretation of the Swiss-American Treaty of 1850 (that each piece of personal property of a U. S. citizen and domiciliary dying in Switzerland must devolve in accordance with the law of the place where some indicia of that specific item of property was physically situated at the moment of death)—an interpretation, as will be seen, that is so novel that it has never been accepted by any court or supported by any commentator in the 116 year history of the treaty and is contrary to the rule, uniformly and expressly adopted in this country and in Switzerland, that all personal property of a decedent devolves in accordance with the law of his domicile.

Petitioner sought below to explain the staleness of this second suit in New York (brought in 1961) by asserting that it was not until 1959 that he learned that decedent had per-

sonal property with him when he died and that the Surrogate in 1957 was also not aware of that fact. That, as the Court of Appeals explicitly stated, was proven by the record "conclusively" not to be so. (17 NY2d, at p. 271.) And, not only is that determination by the Court below completely supported by the record (A226, 152, 234, 222), but the transcript of the hearing before the Surrogate in the first New York suit on January 14, 1957 further confirms beyond question that petitioner and the Surrogate both were well aware of the fact that this decedent had personal property with him in Switzerland when he died. Petitioner's attorney at that time told the Surrogate (pp. 4-5):

> "I feel that the court in Switzerland threw the case out because they felt that at the preliminary stages it was not necessary for the protection of Jean Jules Rougeron that they attach the property * * *." *

The Surrogate in this second New York suit dismissed the petition because petitioner had already litigated to a final determination the question of whether he had an interest in this estate (A6-9). The Appellate Division unanimously affirmed, without opinion (A256-257) and the Court of Appeals likewise affirmed (17 N.Y. 2d 264). The latter court not only held that petitioner was barred by the prior final decree (pp. 270-271), but went on to consider the merits of petitioner's new allegations as to the meaning of the treaty and ruled against him on that ground also (pp. 271-273).

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* The petition for certiorari, however, continues to mislead in this connection by continuing incorrectly to state (pp. 8, 9) that the petitioner did not know that decedent had personal property with him when he died.

Petitioner alludes to the proceedings abroad and suggests that "there is something wrong" (Pet. for Cert., p. 29) in the widow having taken decedent's personal property back to New York after he died; that if she had left these stock certificates, traveler's checks and bank books in Switzerland for the 4½ years after decedent's death until petitioner obtained a decision from a Geneva court (on the facts presented to it) that decedent was domiciled in Switzerland, petitioner would be able to claim his forced heirship.

Significantly, however, petitioner did not see fit to place in the record below the full facts of the foreign proceedings. Nor did petitioner brief this argument in the Courts below, having erroneously founded his argument on an alleged lack of disclosure to the New York court in the first New York proceeding. This failure apparently created some confusion in the Court of Appeals and the dissent. However, enough of the foreign proceedings are in the record, to demonstrate that the decision below is eminently correct and there are no new or important questions raised by this case.

In addition to the two suits in New York (the second of which, as indicated, is the subject of the present petition for certiorari) there have been proceedings between these same parties (the widow and petitioner) in France and Switzerland concerning this same estate. In France, petitioner asserted that decedent was a French national, had died domiciled in Switzerland and by virtue of French law was entitled to a share in the estate (A196-197). The French courts held (as late as June 7, 1960), as had the

New York court in 1957, that decedent died domiciled in New York and that appellant had no interest in the estate (A203-217).

In Switzerland, in January 1955, petitioner brought a proceeding to attach the personal property of decedent and prevent the widow from bringing it back to the United States. The Swiss courts refused to compel the widow to keep the property in Switzerland (A233) and, accordingly, she did nothing wrong in returning it to the United States. These were, it must be remembered, stock certificates in the decedent's name in United States corporations, bank books on United States banks in the decedent's name and traveler's checks of a United States issuer.

Thereafter, on January 14, 1957, some two years *after* the commencement of the first New York suit in which petitioner litigated his right to share in the estate, petitioner brought a suit in Switzerland alleging that decedent was domiciled in Switzerland and that (again contrary to what he alleges in this suit) decedent's personal property devolved in accordance with the law of his domicile (A103, 104). On November 4, 1958, four and a half years after the New York probate proceeding, an intermediate court in Geneva, reversing the trial court, found Swiss domicile and, applying the rule (which petitioner in this case would not follow) that personal property goes according to the law of the domicile, decreed forced heirship notwithstanding the will (A142-175).*

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* This Geneva court decision has been "much criticised" in Switzerland for denying to United States citizens domiciled in Switzerland the right to eliminate by will the forced heirships provided by Swiss law. 4 Martindale-Hubbell, Law Digests, p. 3300 (1966).

Significantly, the Swiss court, as has every court that has ever considered the question—in this country and in Switzerland—expressly held, contrary to petitioner's theory in this case, that the decedent's personal property must devolve according to the law of his last domicile (A168).

In short, the three New York courts below were all correct and for more than one reason. In the first place, petitioner has already litigated to a final determination in an earlier New York proceeding the question of whether he has an interest in this estate (including the very same treaty provision that he urges in this second proceeding). And, in the second place, his theory that the treaty divests the New York courts of jurisdiction to grant probate of the wills of New York domiciliaries and requires the fragmentation of estates, that is, the devolution of each piece of personal property according to the law of the country where each item may be physically located at the moment of death, is totally unsupportable.

That being so, and it also being so that this petitioner has already litigated the question of his right to share in this estate, the three courts below were each correct in denying the petition and this petition for certiorari should likewise be denied for the decisions below are correct, involve no new principles of law and are founded on *res judicata*, an adequate state ground.

ARGUMENT

I

Petitioner litigated to a concededly final determination the question of whether he has an interest in this estate in the first New York proceeding. He argued the treaty in that proceeding. The fact that he seeks now to urge another interpretation of that same treaty does not give him the right to relitigate. Nor does it raise a federal question, *res judicata* being an adequate state ground for decision.

There is nothing new or different in this suit (begun by petitioner in the New York Surrogate's Court in 1961) than was in the earlier suit in the same court in which petitioner was a protagonist (beginning in 1955 and ending in a final judgment in 1957). The only thing new is petitioner's attempt to change his position and argue an interpretation of the treaty contrary to what he argued to a final judgment in the earlier proceeding.

In the first New York suit petitioner expressly raised the very same treaty that he now (in the second suit) urges as the sole basis of his claim for an interest in this estate. In his pleadings in that first suit, dated October 19, 1956, petitioner, in so many words, alleged (A227):

> "That according to the Convention of November 25, 1850 between the Swiss Confederation and the United States of America duly ratified by the United States Senate in 1855, still valid as to the matter of Estates, provides [*sic*] that litigation that may arise between claimants to an estate, with respect to knowing to whom the estate should belong must be brought be-

> fore the Courts and judged according to the laws of the country in which the property is located, namely; by country in which property is located is meant the following: for real estate, place of its location, and for the personalty, that of the last domicile of the deceased, to wit: Switzerland."

As noted, in that first New York case, petitioner lost on the issue of domicile, the Surrogate, after a trial, finding domicile to have been in New York. Petitioner in this second New York case concedes domicile to be in New York, but now urges that the treaty does not refer to the law of the last domicile to determine the devolution of personal property, but looks to the physical location of each item of property at the moment of death. As he put it in his brief below (pp. 15-16):

> "The Treaty * * * gives exclusive jurisdiction to the courts of the situs to determine devolution and distribution * * *. Under the Treaty, domicile is irrelevant and has nothing whatever to do with either the jurisdiction of the courts or the determination of the applicable law of devolution or distribution." *

The only question thus is whether a party having once argued and tried an interpretation of a treaty unsuccessfully to a final judgment can change his position as to that interpretation and, years later, re-argue the case on the sole ground that a treaty is involved.

The courts below in this case have uniformly held that he cannot—and correctly so.

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* This theory is, of course, one that petitioner concedes has never been adopted in the 116 year history of the Treaty (Appellate Division Brief, p. 11).

The cases recognizing that "a demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever" (*Cromwell* v. *County of Sac*, 94 U. S. 351, 353 [1876]) have been, as Mr. Justice Cardozo noted, "elaborated with special emphasis in many judgments of the Supreme Court" and "is not the doctrine of that court alone" (*Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 307 [1929]).

As respondent pointed out below—and as all three courts below held—"* * * those who have contested an issue shall be bound by the result of the contest, and * * * matters once tried shall be considered forever settled as between the parties" (*Baldwin* v. *Iowa State Travelling Men's Assn.*, 283 U. S. 522, 525 [1931]). The cases so holding are legion. See, e.g., *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938); *Heiser* v. *Woodruff*, 327 U. S. 726, 733 (1946); *Reed* v. *Allen*, 286 U. S. 191, 193, 199 (1932).

As we argued below—and as the courts below all held—the rule that "as between the parties" one of them may not "reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded", as this Court has explicitly stated, "applies also to jurisdictional questions." "After a contest these cannot be relitigated as between the parties." *Williams* v. *North Carolina*, 325 U. S. 226, 230 (1945). And, as this Court has also noted, this is but well-settled law. See, e.g., *Davis* v. *Davis*, 305 U. S. 32, 43 (1938); *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29-30 (1917); *Forsyth* v. *Hammond*, 166 U. S. 506, 517-518 (1897).

Petitioner has not cited nor can we find any case that holds otherwise. In no case was a right litigated and then permitted to be relitigated by the same party, as petitioner seeks here to do with respect to his asserted right to share in a part of this decedent's estate. In point of fact, *Morris* v. *Jones,* 329 U. S. 545 (1947), cited by petitioner (Pet. for Cert., p. 19), not only does not help him, but confirms that the courts below were correct. Relying on "res judicata" as one of the reasons for requiring a Missouri judgment to be given full faith and credit, this Court explicitly said (p. 551):

> "* * * a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment."

In sum, the decision below rests—and was rested—on a plainly adequate state ground. And the fact that the Court of Appeals went on to rule against petitioner also on his latest theory as to the meaning of the treaty, does not change that. Petitioner tells us (Pet. for Cert., p. 19) that "We can dispose quickly of any suggestion that there is an 'adequate State ground' for the decision, i.e. that the case was decided on a point of procedural estoppel under State law and the federal questions need not be reached. Both the majority and dissenting opinions excluded estoppel and both opinions decided the federal questions on the merits." That is not so. The third sentence of the dissent expressly states: "It has been held that appellant is estopped by the order of the Surrogate admitting the will to probate in New York County [the first New York suit]" and that, indeed, is what the Court of Appeals, the Appellate Division and the Surrogate each held below. Chief Judge Desmond,

writing for the majority in the Court of Appeals, pointed out (17 N. Y. 2d, at p. 270):

> "Respondent, while disagreeing with petitioner as to the meaning and applicability of the treaty (and calling to our attention that petitioner pleaded this same treaty as a basis for relief to him in the probate proceedings), takes her stand firmly on the proposition that the unappealed New York Surrogate's decree directing probate of the will on a finding after testimony taken that decedent had his domicile in New York is a complete bar to any demand or claim of petitioner [citing the leading federal and New York *res judicata* cases]."

The opinion goes on to say (as does respondent herein) that "the meaning and application of a treaty is still a question of law which if decided erroneously must be reviewed on appeal, otherwise the judgment is conclusive". In other words, as the Court goes on, since the Surrogate in the first New York case (the probate suit) had jurisdiction of the general subject matter, if the petitioner did not like the Surrogate's treatment of the treaty question, petitioner should have raised that on appeal and, failing to have appealed, the judgment is conclusive as to him. In Chief Judge Desmond's words (17 N. Y. 2d, at p. 271):

> "The Surrogate's Court of New York County had general subject-matter jurisdiction as to probate of wills and as to the probate of the will of this decedent who had a residence in New York and property there. Petitioner never really took a position different from this in the Surrogate's Court (he asked the court to rule that the will was 'invalid') although he now tardily asserts that the Surrogate's jurisdiction extended only to entering an order against the respondent and

directing her to return the property to Switzerland and to the Swiss courts. The petitioner seems to be arguing also that he should not be charged with estoppel or waiver because, so he intimates, he did not know that valuable property of the estate had been taken from Switzerland to New York. The record before us, however, proves conclusively that petitioner did know this fact at the time of this New York probate.

"We turn to the treaty. * * *"

The majority thus, as the dissent expressly confirms, decided that petitioner was barred by the prior proceeding, as well as being wrong in his latest interpretation of the treaty.

The Surrogate in this case (and the Appellate Division by its unanimous affirmance without opinion) stopped at the state ground for decision and did not go on to consider the treaty question. Thus, the Surrogate wrote (A7):

"Having allowed the decree which held him to be without any interest in this estate to become final without appeal, the petitioner was obviously incapable of objecting to the account of the fiduciary filed thereafter. In apparent recognition of the situation the administrator c.t.a. in the proceeding for the settlement of its account quite properly omitted to cite the moving party as a respondent for the question of his right to participate in matters affecting the estate had already been clearly resolved against him. Lacking any interest in the estate he is not now entitled to an order setting aside and nullifying the decree settling the account."

This petitioner, in other words, squarely litigated to a final judgment in the truly adversary first New York proceeding the sole question involved here in this second New

York suit—whether he had an interest in this estate. Having done so, petitioner cannot now raise that question again, as the courts below have each held. And that determination raises no federal question. As this Court said in *Lynch* v. *New York*, 293 U.S. 52, 54-55 (1934):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

That that is so, that this Court will not review a state court decision where a state ground of decision is sufficient to support the judgment so that the asserted federal grounds are not necessary to the decision below, has long been the rule. See, e.g., *Klinger* v. *Missouri*, 80 U.S. 257, 263 (1871); *Eustis* v. *Bolles*, 150 U.S. 361, 366 (1893); *Allen* v. *Arguimbeau*, 198 U.S. 149, 154-155 (1905); *Walter A. Wood Co.* v. *Skinner*, 139 U.S. 293 (1891); *Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U.S. 157, 163-164 (1917); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210-211 (1935); *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 198 (1965).

And, that *res judicata* is an independent state ground for decision broad enough to sustain a judgment is also beyond question. See, e.g., *Northern Pac. R. Co.* v. *Ellis*, 144 U.S. 458, 464 (1892); *Haley* v. *Breeze*, 144 U.S. 130 (1892); *Garr, Scott & Co.* v. *Shannon*, 223 U.S. 468, 470 (1912); see, also, *Hale* v. *Lewis*, 181 U.S. 473, 479-480 (1901) (estoppel by waiver); *Pierce* v. *Somerset Railway*, 171 U.S. 641, 648 (1898) (estoppel by laches and acquiescence); *Moran* v. *Horsky*, 178 U.S. 205, 215 (1900) (laches); *Enterprise Irrigation Dist.* v. *Canal Co.*, *supra*, 243 U.S.

157, 165 (1917) (estoppel *in pais*); *Rector* v. *Ashley*, 73 U.S. 142 (1867) (statute of limitations).

In short, as has always been the rule, if the state judgment could have been rendered without reaching the federal question, certiorari cannot be granted. See, e.g., *Lynch* v. *New York, supra*, 293 U.S. 52, 54 (1934); *Cuyahoga Power Co.* v. *Northern Realty Co.*, 244 U.S. 300, 303-304 (1917); *Consol. Turnpike* v. *Norfolk etc. Ry. Co.*, 228 U.S. 596, 599 (1913); *De Saussure* v. *Gaillard*, 127 U.S. 216, 234 (1888).

Indeed, even beyond that, in *Stembridge* v. *Georgia*, 343 U.S. 541, 547-548 (1952), this Court said:

> "We are without jurisdiction when the question of the existence of an adequate state ground is debatable. *Bachtel* v. *Wilson*, 204 U.S. 36."

Here, there is no debate. This petitioner tried out the question in the first New York proceeding (long since reduced to final judgment against him) as to the meaning of the treaty and whether under its application he has an interest in this estate. On fundamental principles, as the courts below have held, he cannot try out that question again in this second suit in the same court.

For that reason alone, the petition herein must be denied.

II

There is nothing wrong or novel in the decisions below that the entire estate passed to the widow pursuant to the express terms of the will.

Petitioner's sole claim on the merits is that the Surrogate's Court lacked jurisdiction over part of the subject matter, that is, over any item of personal property which he contends "had its *situs* in Switzerland on date of death" (Brief below, p. 20). Absent the treaty, petitioner does not question that the New York Surrogate's Court had jurisdiction over *all* of this decedent's personalty and that all of it properly passed to the widow pursuant to the express terms of the will. As he put it: "If there were no Treaty, the Surrogate would normally apply New York law to all decedent's personalty including that part which had its *situs* in Switzerland" (Brief below, p. 26). Yet, arguing that "domicile * * * has nothing whatever to do with either the jurisdiction of the courts or the determination of the applicable law of devolution" (Brief below, pp. 15-16, 20) and conceding that his theory may produce "a result strange or incomprehensible" (Appellate Division Brief, p. 22), or "a result exactly the opposite of that which would be reached in a conventional decedent's estate" (Brief below, p. 26), petitioner contends—and the statement of the contention alone is enough to evidence its lack of merit—that the Swiss Treaty of 1850 requires this Court to rule that, as he put it in his memorandum in the Surrogate's Court below (p. 33), "each piece of [personal] property" of this United States citizen and New York domiciliary must be distributed according to the laws of distribution of the place where it was situated at the moment of death.

To give face to his argument petitioner claims that he raises novel questions. But, there is no novelty here: petitioner is merely arguing something that has been so well understood, so well settled differently than he now urges, that nobody before has sought to make the contention that he now makes. In point of fact, the treaty does not require this fragmentation of estates, has never been so construed and has uniformly been construed to an opposite effect. Indeed, even in the sole American case cited on this point by petitioner (*Matter of Schneider,* 198 Misc. 1017 [Surr. Ct., N. Y. Co., Frankenthaler, S., 1950]), it was held, contrary to petitioner's position here, that our Surrogate's Court had jurisdiction where there is involved, as here, the estate of a New York domiciliary. And, more than that, in the Geneva court's decision in this case in 1958, it was also held, again contrary to the position of petitioner here, that "There is no doubt that the Treaty of 1850 subjects the estate to the law of the last domicile" (A168). The Court made no division between supposedly "Swiss" items of personal property or "New York" items of personal property—to the contrary, it held that *all* personal property devolved in accordance with the law of the decedent's domicile. And this decedent's domicile, even petitioner now agrees, was correctly determined to be New York (Brief below, pp. 2, 38, 41). Petitioner thus is contending that the New York courts lack jurisdiction to do what it (and also the Swiss court) has done, namely to prescribe that all of this decedent's personal property should devolve in accordance with the law of his domicile.

The construction of the treaty urged by petitioner would do violence to long-settled concepts and to the intent

of the draftsmen of the treaty and would, as petitioner himself explicitly recognized, "lead to a result strange or incomprehensible in New York" (Appellate Division Brief, p. 22) and, we would add, in Switzerland as well.

Here, we are concerned with personal property, not real estate and, as the Surrogate recognized in denying petitioner's claimed interest in this estate in the first New York suit, the undoubted rule is that the law of the domicile governs the devolution of personal property (see, *Matter of Fabbri*, 2 N. Y. 2d 236, 239 [1957]) and nothing in the treaty changed that.

Nussbaum, a recognized authority on the subject thus but confirms the obvious when he tells us (*American-Swiss Private International Law*, 47 Col. L. Rev. 186, 195 [1947]) that it has long been understood that there was, even before the time of the Swiss-American Treaty of 1850, "in Europe as well as in this country a familiar theory which considered movables as legally situated at their owner's domicile." Noting that, precisely as we submit here, "in fact it would be absurd to subject, in the case of widely dispersed movables, each particular cluster of them to a different local inheritance law", the author concludes, as did the Message of the Swiss Federal Council of December 3, 1850 to the Swiss Federal Assembly in explanation of Article VI of the treaty, that "both parties were 'very certain' that Article VI would be given only that meaning attributed to the text of the Treaty of 1847, namely, the control of the law of the last domicile over the entire inheritance question" (Nussbaum, *op. cit., supra*, pp. 195-196). This is the uniform view of the commentators (see, e.g., 5 *Miller on Treaties and Other International Acts of the*

United States 869), as petitioner's failure to cite any to the contrary confirms.

Also confirming this view, Surrogate Frankenthaler, in *Matter of Schneider, supra,* 198 Misc. 1017, at p. 1025 (1950), observed that Article VI of the treaty represented no departure from traditional doctrine but merely "represents a crystallization of extant rules of private international law" and that, as the Swiss cases themselves confirm, the treaty reference to the place where property is "situated" refers all questions to the law of the country of domicile. Thus, he wrote (at p. 1026):

> "The language in the Swiss cases, most of which pertain only to the question of the jurisdiction of courts, indicated that the place in which 'property is situated', as referred to in the treaty, means, in the case of foreign domiciliaries, the country of domicile, upon the Swiss legal fiction that a decedent's entire estate follows his person and is located at his domicile. Such a rule amounts to a statement that the place of *actual* location of property (Switzerland) refers all questions to the law of the place of *presumed* location i.e., the country of domicile." (Emphasis in original.)

The treaty was thus quite apparently designed to produce the uniformity with which both contracting nations were familiar and which has long been recognized as the only common sense way of administering the personal property of a decedent. Yet, petitioner would apply it here to produce the concededly opposite effect, to fragmentize the administration of estates and to make the devolution of any particular item of personal property depend entirely on the fortuity of its location at the moment

of death; a result which Nussbaum rightly denominates "absurd" and which, as petitioner's brief confirms, no case sanctions.

In sum on this point, even on the merits and apart from the fact that the treaty is inapplicable to this case and that petitioner is barred on familiar grounds of *res judicata* from relitigating his claim to an interest in this estate, it is readily seen that the New York courts had jurisdiction to admit the will to probate as valid to pass title to all of this decedent's estate. And, not only is reason and all applicable authority opposed to petitioner's claim, but his own cited authorities (the Treaty of 1850 and *Matter of Schneider, supra*) on analysis support the widow's position that the New York courts had jurisdiction over all of the assets of this estate and that there is no basis for setting their decisions aside.

More than that, the rationale of the Swiss cases would similarly distribute personal property according to the law of the domicile for the very decision of the Geneva court which petitioner urged when he argued the question of domicile below ruled that the property—all of the property—should go by the law of Switzerland only because it found that decedent was domiciled in Switzerland. As the Geneva court put it (A168): "There is no doubt that the Treaty of 1850 subjects the estate to the law of the last domicile * * * the place of location of personal property was the last domicile of the deceased."

It follows that if the Geneva court had found a New York domicile, as the Surrogate did on the full facts pre-

sented to him (A232-237), and as did the French courts thereafter (A204-213), it would have applied New York law for the principle it was observing was the same as our courts traditionally observe, namely that "the law of * * * [the domiciliary] state determines the validity and effect of the will with respect to the disposition of personal property." *Matter of Fabbri, supra,* 2 N. Y. 2d 236 (1957). This has been the unquestioned rule from earliest times. See, e.g., *Harrison* v. *Nixon,* 34 U. S. 442, 445 (1835); *Ennis* v. *Smith,* 55 U. S. 251, 265 (1852—where this Court said: "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time, that it may now be said to be a part of the *jus gentium*"); *Wilkins* v. *Ellett,* 76 U. S. 740, 741-742 (1869—where this Court said: "It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal estate of the deceased is to be regarded for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile").

And this has concededly been the rule uniformly applied in every case where a United States domiciliary died in Switzerland or vice versa. See, for example, *Matter of Batsholts,* 188 Misc. 867 (Surr. Ct., N. Y. Co., 1946), where Surrogate Delehanty, refusing to assume jurisdiction over the estate of an American citizen leaving assets in New York on the ground that he was domiciled in Switzerland, wrote (p. 869):

> "Since the law of deceased's domicile will apply to the disposition of his personalty there would be no reason why this court should concern itself with any controversy over his testamentary acts. Such controversies are properly remitted to the domiciliary jurisdiction" [citing cases].

Likewise, in *Matter of Barandon,* 41 Misc. 380 (Surr. Ct., N. Y. Co., 1903), our courts assumed jurisdiction over the entire estate where there was real and personal property here and personal property in Switzerland and applied the law of the domicile (Switzerland) to all of the personal property.

And, the highest tribunal in Switzerland has similarly referred to the law of the last domicile to determine the devolution of personalty. See, *In re Nussle,* 43 B. E. [1] 77 (1917), where the Swiss Federal Tribunal acknowledged Illinois jurisdiction over the estate of a Swiss national domiciled in Chicago, even though he possessed personal property in Switzerland; *In re Gemeinde Feldis,* 24 F. E. [1] 312 (1898), where the Federal Tribunal assumed jurisdiction over the personal estate of a person of dual United States-Swiss citizenship on the ground that he was domiciled in Switzerland; and *In re Wohlwend,* 9 B. E. 507 (1883), where the Federal Tribunal refused jurisdiction over the estate of a similar dual citizen who died leaving property in Illinois and a bank account in Switzerland, again on the ground that the decedent was domiciled in Illinois.

The courts of this country and Switzerland thus both plainly reject petitioner's basic contention that "domicile

is irrelevant and has nothing whatever to do with either the jurisdiction of the courts or the determination of the applicable law of devolution or distribution" (Brief below, pp. 15-16, 20).

Petitioner now says that it was wrong for the widow to remove the stock certificates, bank books and traveler's checks from Switzerland after her husband died, that this was "self-help" and not "civilized" and reason for this Court to intervene (Pet. for Cert., pp. 3, 31-35). But, the widow was not obliged to hold those papers in Switzerland for years on the chance that a suit might be brought and that there might be a finding (4 years later) of forced heirship.* She did what anyone in her position should have done: she sent the securities, checks and bank books home to New York City—where her husband had lived most of his life, where he maintained his bank accounts, where they paid their New York State income taxes and which he referred to as "home" in correspondence to his bank shortly before his death. Indeed, when the Swiss court in the proceeding brought by petitioner in January 1955 specifically refused to attach the property or, as the Surrogate noted in the first New York suit (A233) "to compel her to turn over to a notary to be appointed by the court all the assets of the decedent to be managed by him pending distribution" the Swiss court was specifically permitting her to return

* The petition for certiorari is incorrect in suggesting (pp. 4, 15, 28, 31) that the "personal property" had "been transported to New York *pendente lite*". In point of fact, as petitioner's own evidence shows, after he lost his suit to attach the property, petitioner's next suit in Switzerland was not brought until January 14, 1957 (A103-104), almost two full years after the New York probate proceeding had been brought and long after the widow returned the stocks, bank books and traveler's checks to New York.

the securities, bank books and checks to New York. Thus, there was no "self-help * * * hardly conducive to a peaceful international order" which petitioner claims to be "exactly what has happened in this case" and "a point which the majority opinion below ignores" (Pet. for Cert., pp. 3, 30-34). To the contrary, the majority opinion below specifically notes that prior to the widow returning the stock certificates, bank books and checks to New York, petitioner failed in his effort to obtain "a sequestration order" (17 N.Y.2d, at p. 269).

Nor did the widow do anything not conducive to comity immediately after her husband's death when she appeared before a Swiss Notaire (as she was obliged to do in accordance with Swiss tax law and procedure) who caused a preliminary certificate of inheritance to issue (A42-54). Such is the usual practice in the Canton of Geneva when a decedent dies with a will prepared in Geneva—and probably held by a local Notaire (A45, 54, 89). It is significant to note that the certificate that was issued specifically stated that it was "without prejudice of all actions for annulment (of the last will) or all petitions for right of inheritance" —including, it must be pointed out, the widow's right to inherit under the laws of her American husband's New York domicile on a full showing of all of the facts necessary to establish domicile (A57). In any event, as the petitioner's suit to restrain removal of the property from Switzerland demonstrates, the widow had the admitted right to send the bank books, stock certificates and traveler's checks home when she did.

Conclusion

The petition herein presents no novel or wrongly decided questions. Nor was there any determination not supported by an adequate state ground of decision. It is, in short, nothing more than further protraction of already extended prior litigation.*

Respondent respectfully submits that a writ of certiorari in this case can serve no useful purpose and should be denied.

Respectfully submitted,

FRANCIS S. BENSEL
BUD G. HOLMAN
Counsel for Respondent-Respondent

KELLEY DRYE NEWHALL MAGINNES & WARREN
Of Counsel

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* In this connection, it should be noted that subsequent to the affirmance by the Court below, petitioner sought to serve respondent, through the French Consulate in New York, with papers in another proceeding in France.